UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JENNIFER N. RODRIGUEZ, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. CV-08-5087-CI ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO SENTENCE FOUR 42 U.S.C. § 405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 19.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Jennifer Rodriguez(Plaintiff) protectively filed for social security income (SSI) on October 28, 2004. (Tr. 80, 179.) Plaintiff initially alleged an onset date of May 18, 2001, but later amended the alleged onset date to September 26, 2005. (Tr. 80, 410.)

Benefits were denied initially and on reconsideration. (Tr. 37, 45, 49.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Paul Gaughen on July 23, 2007. (Tr. 415-44.) Plaintiff was represented by counsel and testified at the hearing. (Tr. 422-38.) Medical expert Reynolds Hoover, M.D., and vocational expert William Weiss also testified. (Tr. 417-22, 438-42.) A supplemental hearing was held on January 24, 2008. (Tr. 386-412.) Plaintiff appeared telephonically and testified. (Tr. 400-04.) Vocational expert Dan McKinney also testified. (Tr. 399-400, 404-08.) The ALJ denied benefits (Tr. 17-30) and the Appeals Council denied review. (Tr. 6.) The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcripts and file, and will, therefore, only be summarized here.

At the time of the first hearing on July 23, 2007, Plaintiff was 30 years old. (Tr. 423.) Plaintiff attended school through the sixth grade. (Tr. 423.) She testified that she left school to avoid gangs. (Tr. 423-24.) She has a limited work history as an agricultural worker and as a laundry worker. (Tr. 399-405.) She testified that the main thing preventing her from maintaining a job is her sickness, including depression, anxiety, and Grave's disease. (Tr. 426.) She said she has to lay down four times a day for a total of five hours each day. (Tr. 428-29.) She has had anxiety attacks at home, as well as in public. (Tr. 427-32.) She testified that she has problems socializing and with concentration. (Tr. 431.) Plaintiff has a history of substance abuse. (Tr. 432-34.) She testified that she had been clean and sober for four to five years. (Tr. 468.)

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler,* 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan,* 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services,* 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze,* 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180

F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Sec'y of Health and Human Services,* 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if his impairments are of such severity that Plaintiff is not only unable to do his previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is

engaged in substantial gainful activities. If the claimant is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I).

If the claimant is not engaged in substantial gainful activities, the decision maker proceeds to step two and determines whether the claimant has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied.

If the impairment is severe, the evaluation proceeds to the third step, which compares the claimant's impairment with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled.

If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents the claimant from performing work he or she has performed in the past. If plaintiff is able to perform his or her previous work, the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual functional capacity ("RFC") assessment is considered.

If the claimant cannot perform this work, the fifth and final step in the process determines whether the claimant is able to perform other work in the national economy in view of his or her residual functional capacity and age, education and past work experience. 20

C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant establishes that a physical or mental impairment prevents him from engaging in his or her previous occupation. The burden then shifts, at step five, to the Commissioner to show that (1) the claimant can perform other substantial gainful activity, and (2) a "significant number of jobs exist in the national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

A finding of "disabled" does not automatically qualify a claimant for disability benefits. *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001). When there is medical evidence of drug or alcohol addiction, the ALJ must determine whether the drug or alcohol addiction is a material factor contributing to the disability. 20 C.F.R. §§ 404.1535(a), 416.935(a). It is the claimant's burden to prove substance addiction is not a contributing factor material to her disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9th Cir. 2007).

If drug or alcohol addiction is a material factor contributing to the disability, the ALJ must evaluate which of the current physical and mental limitations would remain if the claimant stopped using drugs or alcohol, then determine whether any or all of the remaining limitations would be disabling. 20 C.F.R. §§ 404.1535(b)(2), 416.935(b)(2).

ALJ'S FINDINGS

At step one of the sequential evaluation process, the ALJ found Plaintiff has not engaged in substantial gainful activity since September 26, 2005, the amended alleged onset date. (Tr. 19.) At step two, he found Plaintiff has the severe impairments of polysubstance dependence, cannabis abuse, and antisocial traits. (Tr. 19.) At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 22.) The ALJ then determined:

> [T]he claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional limitations: inability to perform complex reasoning or executive functioning tasks, especially in a written format or stated another way *can* handle simple, non-detailed instructions especially if there is verbal statement or restatement of the same. The claimant has no thought disorder and is oriented in all spheres. The claimant *is* capable of performing personal self-care, paying bills and basic reading tasks.

(Tr. 23.) At step four, the ALJ found Plaintiff has no past relevant work. (Tr. 29.) After taking into account Plaintiff's age, education, work experience, residual functional capacity and the testimony of a vocational expert, the ALJ determined at step five that jobs exist in significant numbers in the national economy which Plaintiff can perform. (Tr. 29.) Thus, the ALJ concluded Plaintiff has not been under a disability, as defined in the Social Security Act, since September 26, 2005, the amended date of disability onset. (Tr. 30.)

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Specifically, Plaintiff

asserts the ALJ erred by: (1) improperly considering the medical evidence at step two; (2) rejecting lay testimony of Plaintiff's mother; (3) failing to develop the record regarding cognitive limitations; and (4) presenting an incomplete hypothetical to the vocational expert. (Ct. Rec. 18 at 12.) Defendant argues: (1) Plaintiff failed to prove a severe mental impairment at step two; (2) the ALJ was not required to obtain a consultative examination; (3) the ALJ properly rejected lay testimony from Plaintiff's mother; and (4) the ALJ presented a complete hypothetical to the vocational expert. (Ct. Rec. 20 at 2-3.)

DISCUSSION

Plaintiff argues the ALJ improperly rejected the opinions of Plaintiff's treating providers, leading to an improper rejection of Plaintiff's mental health impairments as "frivolous" at step two.[1]

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[1]It is noted that the term "frivolous" does not appear in the ALJ's decision. Plaintiff cites *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987), and asserts, "As the United States Supreme Court declared, the step two inquiry is simply a *de minimis* screening device to dispose of groundless or frivolous claims. . . . This of course means that an ALJ cannot dismiss a claim at step two unless he determines that it is groundless or frivolous." (Ct. Rec. 18 at 15.) This statement does not accurately describe the *Bowen* holding regarding step two. In *Bowen*, the Supreme Court upheld the validity of the severity regulation, as clarified in S.S.R. 85-28. *Id.* The word "frivolous" neither appears at page 153-54 of the opinion, nor anywhere in the opinion except the dissent. *Id.* at 180-81. The ALJ's finding that a medically determinable impairment does not fall within

(Ct. Rec. 18 at 14.) Plaintiff asserts diagnoses of post-traumatic stress disorder (PTSD), panic disorder, agoraphobia, depression and bipolar disorder reflect a severe mental health impairment. (Ct. Rec. 18 at 15.) Defendant argues Plaintiff's assertions of additional impairments are not supported by the record and that the ALJ properly considered the psychological evidence. (Ct. Rec. 20 at 7-8.)

At step two of the sequential process, the ALJ must determine whether Plaintiff suffers from a "severe" impairment, i.e., one that significantly limits his or her physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). To satisfy step two's requirement of a severe impairment, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The fact that a medically determinable condition exists does not automatically mean the symptoms are "severe" or "disabling" as defined by the Social Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *fair*, 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

The Commissioner has passed regulations which guide dismissal of claims at step two. Those regulations state an impairment may be found to be not severe when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work." S.S.R. 85-28. The Supreme Court upheld the validity of the

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the definition of "severe" found in the Regulations does not mean the ALJ discarded the claim as frivolous.

Commissioner's severity regulation, as clarified in S.S.R. 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987). "The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs." S.S.R. 85-28. Basic work activities include: "walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; seeing, hearing, and speaking; understanding, carrying out and remembering simple instructions; responding appropriately to supervision, coworkers and usual work situations; and dealing with changes in a routine work setting." *Id.*

Further, even where non-severe impairments exist, these impairments must be considered in combination at step two to determine if, together, they have more than a minimal effect on a claimant's ability to perform work activities. 20 C.F.R. § 416.929. If impairments in combination have a significant effect on a claimant's ability to do basic work activities, they must be considered throughout the sequential evaluation process. *Id.*

As explained in the Commissioner's policy ruling, "medical evidence alone is evaluated in order to assess the effects of the impairments on ability to do basic work activities." *Id.* Thus, in determining whether a claimant has a severe impairment, the ALJ must evaluate the medical evidence.

In this case, the ALJ identified three severe impairments: polysubstance dependence, cannabis abuse, and antisocial traits. (Tr. 20.) The ALJ noted that the record supports a medically determinable cognitive impairment, but concluded it is not severe in nature. (Tr. 21.) The ALJ also found the record does not confirm any physical medically determinable impairment. (Tr. 22.)

Plaintiff argues Dr. Johnson's opinion establishes a severe mental impairment.[2] (Ct. Rec. 18 at 16-17.) She argues the ALJ "summarily rejected" the opinion without providing adequate reasons. In evaluating medical or psychological evidence, a treating or examining physician's opinion is entitled to more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with "clear and convincing" reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995). Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical support for doctors' reports based substantially on a claimant's subjective complaints of pain as specific, legitimate reasons for

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[2]Plaintiff's primary argument is that Dr. Johnson's assessment that Plaintiff has some marked limitations was "*twice* presented hypothetically to *two separate* vocational experts, and were both times acknowledged as insurmountable barriers to competitive employment." (Ct. Rec. 18 at 16.) This, however, does not reflect on the validity of the ALJ's reasoning or respond to weaknesses in the medical opinion identified by the ALJ. The fact that one or more vocational experts conclude that a hypothetical individual with certain limitations could not sustain employment is not relevant if those limitations are not supported by substantial evidence in the record.

disregarding a treating or examining physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989). The opinion of a non-examining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician. *Lester*, 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). However, the opinion of a non-examining physician may be accepted as substantial evidence if it is supported by other evidence in the record and is consistent with it. *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31. Cases have upheld the rejection of an examining or treating physician based on part on the testimony of a non-examining medical advisor; but those opinions have also included reasons to reject the opinions of examining and treating physicians that were independent of the non-examining doctor's opinion. *Lester*, 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989) (reliance on laboratory test results, contrary reports from examining physicians and testimony from claimant that conflicted with treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995) (rejection of examining psychologist's functional assessment which conflicted with his own written report and test results). Thus, case law requires not only an opinion from the consulting physician but also substantial evidence (more than a mere scintilla but less than a preponderance), independent of that opinion which supports the rejection of contrary conclusions by examining or treating physicians. *Andrews*, 53 F.3d at 1039.

Dr. Johnson examined Plaintiff on May 2, 2006 and prepared a psychiatric evaluation. (Tr. 370-73.) He diagnosed PTSD, panic

disorder with agoraphobia, generalized anxiety disorder and polysubstance abuse. (Tr. 373.) Dr. Johnson saw Plaintiff again in June and December 2006 for medication management. (Tr. 337, 376.) In March 2007, Dr. Johnson completed a mental residual functional capacity assessment form. (Tr. 345-47.) He assessed six moderate limitations and two marked limitations. (Tr. 345-47.) The May 2006 psychiatric evaluation and the December 2006 visit summary were not in the record reviewed by the ALJ, but were submitted to the Appeals Council. (Tr. 10.) Although the ALJ did not review this evidence, it is properly considered by the court because the Appeals Council considered it in denying Plaintiff's request for review. *See Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993).

The ALJ rejected Dr. Johnson's opinion for two reasons. First, the ALJ suggested that Dr. Johnson's opinion was unsupported and inadequately explained. A medical opinion may be rejected by the ALJ if it is conclusory, contains inconsistencies, or is inadequately supported. *Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009); *Thomas*, 278 F.3d at 957. The ALJ emphasized that the June 2006 office visit was a 15-minute visit, and noted that nine months later, "without any documented evidence of continued treatment," Dr. Johnson opined Plaintiff would have a number of marked and moderate limitations. (Tr. 27.) The ALJ then observed, "There was no indication on the checklist questionnaire [the mental RFC] of the medical basis of Dr. Johnson's opinion or of any objective medical findings in the record he used to support his opinion." (Tr. 28.) However, the evidence submitted to the Appeals Council indicates that Dr. Johnson did in fact have more than 15 minutes of contact with

Plaintiff. The office visit in May 2006 was noted to have lasted one hour and a follow-up visit occurred in December 2006 in addition to the June 2006 appointment. (Tr. 319, 376.) Thus, the ALJ's understanding that Dr. Johnson's mental RFC assessment was based on one 15-minute office visit was erroneous, although the ALJ could not have known that based on the record.

Second, the ALJ justified rejecting Dr. Johnson's opinion by suggesting that it is inconsistent with another, more thorough report in the record. The ALJ noted Dr. Johnson's opinion "is in contrast to the thorough clinical evaluation by Dr. Toews." (Tr. 28.) Dr. Toews evaluated Plaintiff in May 2005. His report contained a history of Plaintiff's current complaints, a brief social and psychological history, and a mental status analysis. (Tr. 319-22.) However, Dr. Johnson's May 2006 evaluation, which was not available to the ALJ, is in the same basic format and appears to be of comparable thoroughness when compared to Dr. Toews' report. Thus, the ALJ's reasoning was again based on incomplete information.

Considering only the record available to the ALJ, rejection of Dr. Johnson's opinion was based on a reasonable interpretation of the evidence. However, the records submitted to the Appeals Council show the ALJ's reasons for rejecting Dr. Johnson's opinion are not supported by the record. Had the ALJ had the opportunity to review those records, his conclusion about Dr. Johnson's March 2007 assessment of limitations might have been different.

Because the ALJ's reasons for rejecting Dr. Johnson's conclusion were based on an incomplete record, the matter must be remanded. Remand is the appropriate remedy because,

While we properly may consider the additional evidence

> presented to the Appeals Council in determining whether the Commissioner's denial of benefits is supported by substantial evidence, it is another matter to hold on the basis of evidence that the ALJ has had no opportunity to evaluate that Appellant is entitled to benefits as a matter of law.

Harman, 211 F.3d at 1180. Furthermore, even if the additional evidence from Dr. Johnson justified a finding of disability (and it may not), the ALJ must then conduct a *Bustamante* analysis because the record contains evidence of substance abuse. *See* 262 F.3d at 955. Upon reevaluation of Dr. Johnson's opinion, the ALJ may need to reconsider his findings at step two and throughout the sequential evaluation process. As a result, the court does not reach Plaintiff's other assignments of error. The court expresses no opinion as to what the ultimate outcome on remand will or should be.

CONCLUSION

Having reviewed the record and the ALJ's findings, the court concludes the ALJ's decision is not supported by substantial evidence. On remand, the ALJ should reassess the opinion of Dr. Johnson and other psychological evidence, taking into account the evidence considered by the Appeals Council, which is part of the record on remand. If necessary, the ALJ should conduct a new sequential evaluation and make new findings consistent with the evidence. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment **(Ct. Rec. 17)** is **GRANTED**. The matter is remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

2. Defendant's Motion for Summary Judgment **(Ct. Rec. 19)** is **DENIED.**

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED December 10, 2009.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE